

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE TOBIAH YOUNG,

Defendant-Appellant.

UNPUBLISHED
February 25, 2010

No. 287771
Wayne Circuit Court
LC No. 08-001847

Before: Gleicher, P.J., and O’Connell and Wilder, JJ.

PER CURIAM.

After a jury trial, defendant Jermaine Tobiah Young was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and sentenced to concurrent terms of 4 to 15 years’ imprisonment for each conviction, with 34 days’ credit for time served. He appeals as of right. We affirm defendant’s convictions but remand for amendment of his presentence investigation report (PSIR).

First, defendant claims that the prosecutor engaged in misconduct by improperly vouching for the credibility of the victim and calling defendant a liar during her closing argument. We disagree. Because defense counsel failed to preserve this issue before the trial court, we review the issue for plain error. *People v Wilson*, 265 Mich App 386; 695 NW2d 351 (2005). A defendant must establish that the error was plain and that it affected the outcome of the proceedings. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence. *Id.* at 389-390.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor’s remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

Defendant argues that the prosecutor improperly vouched for the credibility of Lewis and the mendacity of defendant. “A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses’ truthfulness.” *People v Seals*, 285 Mich App 1, 22; ___ NW2d ___ (2009). A prosecutor may, however, argue from the facts

in evidence that the defendant or another witness is worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008), but is free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

In this case, the prosecutor did not engage in misconduct by improperly vouching for witnesses. The prosecutor based her statements about the credibility of the victim and defendant on the evidence in the record, especially their respective testimony, and not on any special knowledge she had or on the prestige of the prosecutor's office. When the prosecutor argued that the victim was consistent and credible, she based her statements on the detailed nature of the victim's testimony, especially her statements with regard to where her body was located in comparison to defendant's body at the time of the incident. With regard to defendant, the prosecutor suggested that he was lying based on the inconsistencies and omissions in his testimony, including his failure to mention the presence of his sons in the apartment at any point before trial, his inconsistent statements with regard to the reasons that he stopped engaging in sexual conduct with the victim, and his inconsistent statements concerning when the victim said "stop" and what she meant by "stop" when she said it. The prosecutor did not refer to any evidence that was not in the record.

Regardless, even if misconduct did occur, it was remedied through the instructions from the trial court. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Thus, if defense counsel failed to object, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

In this case, despite the failure of defense counsel to object, the trial court cured any prosecutorial misconduct by reiterating on multiple occasions that the statements of the prosecution and the defense do not amount to evidence and the jury must determine the credibility of witnesses. The jury was instructed to base its verdict on the testimony and exhibits it received, not the statements of the prosecution or defense. The jury knew that it should not rely on the prosecutor's statements with regard to assessment of the witnesses' credibility. Therefore, defendant has failed to establish plain error affecting the outcome of the proceedings.

Next, defendant notes that his case should be remanded to the trial court to correct an error on the Presentence Investigation Report (PSIR) so that it reflects the sentencing guidelines range of 51 to 85 months as opposed to 78 to 130 months. We agree. Whether a PSIR reflects the changes ordered by the trial court is a question of law that we review de novo. MCL 771.14(6); *People v Lloyd*, 284 Mich App 703, 706-707; 774 NW2d 347 (2009).

If a trial court finds on the record that the PSIR is inaccurate, the inaccurate information shall be stricken before the report is sent to the Department of Corrections. MCL 771.14(6). In this case, the trial court found that the sentencing guidelines range should be 51 to 85 months instead of 78 to 130 months. The PSIR was not altered to reflect that change. Moreover, the

prosecution concedes that a clerical error was made and should be remedied. Therefore, we remand the case to the trial court for the sole purpose of striking the inaccurate information and amending the PSIR.

Finally, defendant claims that the trial court erred in failing to consider defendant's ability to pay before ordering him to pay restitution and costs. We disagree. Again, because this issue was not preserved, we review for plain error affecting substantial rights. *Wilson, supra* at 386.

By statute, a trial court need not consider a defendant's ability to pay when ordering him to pay restitution and costs. See MCL 780.766. Language requiring the court to consider a defendant's ability to pay was deleted in 1996. 1996 PA 562.¹ Now, a court may consider ability to pay only upon a motion to modify an order of restitution. MCL 780.766(12). Failure to pay restitution is not grounds for incarceration unless the court determines that "the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so." MCL 780.766(14).

Defendant bases his argument entirely on *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), overruled by *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). Defendant's reliance on *Dunbar*, however, is misplaced, because *Dunbar* applies only to a trial court's order for an indigent defendant to pay the costs of his appointed counsel, not restitution generally. *Dunbar, supra* at 255-256. Moreover, in *Jackson, supra* at 275, our Supreme Court expressly overruled the *Dunbar* Court's holding with regard to requiring trial courts to consider a defendant's ability to pay before assigning costs. The trial court did not commit plain error by failing to consider defendant's ability to pay, and the order requiring defendant to pay restitution will not be placed in abeyance.

Affirmed, but remanded for amendment of the PSIR to reflect a sentencing guidelines range of 51 to 85 months. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

¹ Before 1996, MCL 780.766(13) read, "In determining the amount of restitution, the court shall consider the defendant's earning ability, financial resources, and any other special circumstances that may have a bearing on the defendant's ability to pay."